Supreme Court, U.S.
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No. 02-977

In The

Supreme Court of the United States

BRIDGESTONE CORPORATION,

Petitioner,

vs.

T & T TRUCK & CRANE SERVICE, INC., KENAI DRILLING, LTD., and GENE COKER,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California For The Second Appellate District, Division Three

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTION TO QUESTIONS PRESENTED

Respondents Kenai Drilling Limited ("Kenai") and T & T Truck & Crane Service, Inc. ("T&T") object to the Petitioner's statement of the questions presented to the extent that the Petitioner purports therein a lack of control on its behalf with respect to the distribution of its tires in the forum state. The Petition's two questions presented differ from the single issue presented upon petition for review of the decision by the Court of Appeal, which issue did not reference the control of product distribution. By virtue of the fact that the Petitioner's tires were distributed in the United States, including the forum state, through its wholly-owned subsidiary, Bridgestone/Firestone, Inc., it may be said that the Petitioner did, in fact, have "control" over such distribution. There is also evidence that the two corporations share executive officers, and the Petitioner would likely undertake to set up its own office to manage the distribution of its tires in the U.S. if such were not being done by Bridgestone/Firestone, Inc. Consequently, this joint control by the Petitioner and its subsidiary in the distribution of tires in California should be taken into account in the determination whether California may exercise jurisdiction over the Petitioner, and the Petitioner's addition of an inaccurate fact to the equation serves as grounds for denial of certiorari.

Respondents also object to the questions presented in that they vary from the single issue presented by the Petitioner in its Petition for Review submitted to the Supreme Court of California, which issue states:

OBJECTION TO QUESTIONS PRESENTED – Continued

> Does a California court offend the traditional notions of fair play and substantial justice in the Due Process Clause of the Fourteenth Amendment to the United States Constitution when, in a personal injury indemnity action, it exercises personal jurisdiction over a foreign defendant that manufactured its product abroad, and sold and delivered its product abroad to a legally independent distributor, solely on the bases that: (1) the defendant may have expected some of its product would reach California in the stream of commerce, (2) the defendant indirectly earns substantial revenue from its product's use in California, and (3) the particular product involved in the action was resold in California to the ultimate consumer?

The issue thus posed below concerned whether due process is violated when jurisdiction is exercised in the face of a mere possible expectation that the defendant's product would reach California, while the questions currently presented incorporate an assumption that the defendant expected its product would reach the California market. Respondents contend that since the questions presented in the Petition fail to reflect the precise issue presented below, it would be improvident for this Court to grant the Petition.

Finally, Respondents object to the formulation of the questions presented in that the second question presented is subsumed within the first question. Both questions deal with the issue of whether the Due Process Clause has been violated and with a foreign manufacturer's placement of a product in the stream of commerce. The second question's

OBJECTION TO QUESTIONS PRESENTED – Continued

inclusion of the fact that the product "ultimately reaches the forum state" does nothing to render the second question different from the first, as the first question references "products brought into the forum state." Rule 14 requires that a petition for a writ of certiorari contain "[t]he questions presented for review" omitting "unnecessary detail," and provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The second question regarding whether "traditional notions of fair play and substantial justice" are violated under a set of facts is clearly covered by the first question, which simply asks whether the Due Process Clause is violated under the same facts. Therefore, in considering whether to grant the Petition, the second question presented should be disregarded, as a finding in the positive as to the first question would necessitate a similar answer to the second question.

STATEMENT PURSUANT TO RULE 29.6

Respondent Kenai Drilling Limited has no parent corporation, and no publicly held company owns 10% or more of its stock. Respondent T & T Truck & Crane Service, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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REASONS TO DENY THE PETITION

A. Certiorari Should Be Denied Because the Manner in Which the Questions Presented in the Petition are Framed is Substantially Different from the Statement of the Issue Presented Below

Ordinarily, this Court "do[es] not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 204 (Ill. 2000) (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992)). With respect to a respondent's contention, following the granting of a writ of certiorari, that claims made by the Petitioner were not made in the same fashion below, it was stated by this Court that "because respondent did not oppose our grant of review at that time based on her contention that these claims were not pressed below, we will not dismiss the writ as improvidently granted," suggesting that the framing of questions in a different fashion on petition for a writ of certiorari serves as grounds for denial of the writ. *St. Louis v. Praprotnik*, 485 U.S. 112, 119 (1988). As set forth above in the Respondents' Objection to Questions Presented, the questions presented in the Petition are substantially different from the issue presented below. Accordingly, this Court should exercise its discretion to deny certiorari.

B. There is No Compelling Reason to Grant Certiorari, as the Lower Court's Decision is Consistent with Established Precedent

The Petitioner seeks review of the Court of Appeal's ruling upholding the trial court's Order denying its motion to quash service of the cross-complaint brought by Respondents. The record herein reveals that the Superior Court and Court of Appeal ruled correctly in finding that

the trial court has jurisdiction over Bridgestone Corporation. Contrary to what is stated in the Petition [Petition 10], there is ample evidence in the record that the Petitioner knew that 25,000 of its tires were being shipped, per month, to a California-based branch of its wholly-owned subsidiary Bridgestone/Firestone, Inc. for distribution to approximately 450 dealers in California, and as many dealers elsewhere in North America. [Petition 4a] Respondents contend that, under *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 112 (1987), minimum contacts are established by the Petitioner's placement of its tires in the stream of commerce, with the clear expectation that they would reach California, and by the designing of its tires to meet U.S. importation requirements. Additional conduct by the Petitioner which may serve as justification for finding minimum contacts includes its "advertising in the forum State," via the internet, and "marketing of the product through a distributor who has agreed to serve as the sales agent in the forum State," i.e., Bridgestone/Firestone, Inc., both of which acts parallel the examples cited in *Asahi* concerning indications of intent to serve the forum state. *Id.*

None of the three instances in which certiorari is appropriate, according to Rule 10, is present in the instant case, because the decisions of the Court of Appeal and Superior Court are consistent with the current caselaw in question, including *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Nowhere in the opinion of the Court of Appeal herein does the Court indicate that it is departing from the above-mentioned decisions, as the Petitioner implies. [Petition 13-15] Rather, the

opinion follows *World-Wide Volkswagen's* indication that due process has been afforded if the court "asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." [Petition 8a, citing *World-Wide Volkswagen*, 444 U.S. at pp. 297-298.] The Court of Appeal also conducted an analysis of the reasonableness of California's assertion of jurisdiction over the Petitioner in accordance with *Burger King* [Petition 13a-15a]. Finally, as explained in the Court of Appeal's decision, the *Asahi* case did not overrule prior opinions regarding the stream of commerce doctrine and did not affect the "commercial actuality" standard. [Petition 11a] Hence, there is no conflict with respect to *Asahi*.

Even if *Asahi* may be interpreted as a departure from the stream of commerce analysis, this theory was not rejected by a majority in *Asahi*, leaving the courts free to employ this theory in evaluating the issue of whether minimum contacts exist for the purpose of finding specific jurisdiction. As such, the Court of Appeal's decision herein is consistent with the decisions of other federal and state courts. Moreover, in each of the cases cited in the Petition as reflecting a decision to "ignore" *Asahi*, there were, indeed, acts of "purposeful availment" in those cases in which jurisdiction was found, or the court simply ruled that minimum contacts were not present or that *Asahi* was distinguishable on the facts. None of these cases represent a departure from established precedent, rendering it inappropriate for this Court to grant certiorari herein.

In *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir. 1989), the defendant shared in the cost of quality control testing by a laboratory in the forum state,

accepted payments for the product in question, and received debits for bag-cleaning charges of a company based in the forum state. *Id.* at p. 386. The defendant manufacturer in *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-614 (8th Cir. 1994), was found to have benefitted from regional distribution efforts of its distributor, which sold the subject product in the forum state, much as Bridgestone has benefitted from the distribution efforts of Bridgestone/Firestone, Inc., herein; such benefits clearly constitute the "something more" contemplated in *Asahi*. In *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1549 (11th Cir. 1993), the defendant's design of a vehicle for use in the United States was held to constitute an act of purposeful availment with respect to the privilege of conducting business in the forum state of Georgia, which conduct served as an example of the type of additional act necessary to withstand the analysis set forth in *Asahi*. *See Asahi*, 480 U.S. at p. 112; *see also* discussion in **Section D**. below.

In *Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 FN12 (5th Cir. 1993), the court ruled that minimum contacts were lacking, since there was no substantial relationship between the subject matter of the declaratory judgment action at issue and the forum-related activities; hence, the resulting ruling is not inconsistent with *Asahi*. The court in *Keen v. Ashot Ashkelon, Ltd.*, 748 S.W.2d 91, 93 (Tex. 1988), held that *Asahi* was distinguishable, but nonetheless found that there was a "reasonable expectation" on the part of the defendant that its product would reach the forum state, such that the facts therein also included "something more" than the placement of the article in question into the stream of commerce.

Since the opinion of the Court of Appeal herein is in keeping with prior law, is not in conflict with a decision by any other U.S. Court of Appeals, and does not decide an important federal question in a way that conflicts with the decisions of any other U.S. Court of Appeals or state court of last resort, there is no need for this Court to review the matter.

C. The Exercise of Jurisdiction by the Trial Court over the Petitioner is Reasonable

The opinion of the Court of Appeal reflects a careful weighing of the factors indicating whether jurisdiction in California would be reasonable, contrary to the assertion in the Petition that the Court "never truly analyzed reasonableness." [Petition 13 and 13a] In its account of this analysis, the court noted the fact that the ruling in *Asahi* was based on the slight interest of the forum state in an indemnity claim between two foreign entities, which reference belies the suggestion in the Petition that the Court of Appeal failed to consider the reasonableness of California's exercise of jurisdiction over the Petitioner. [Petition 14a] Although the remaining claim to be tried is one for indemnity, it stems from a claim for personal injury from a tire which may be ultimately found to have been defective. Thus, the concern for public safety is an appropriate factor in determining the question of jurisdiction herein, as California has a compelling interest in protecting persons within its borders from unsafe products that find their way into the state. *See Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988). Moreover, the *Asahi* case is clearly distinguishable from the instant case, as both Kenai and T&T are residents of California.

In *Calder v. Jones*, 465 U.S. 783 (1984), the United States Supreme Court articulated the "effects test" for the purposeful availment element of the jurisdictional analysis. The test seeks to identify "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered – and which the defendant knows is likely to be suffered – in the forum state." *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1320, 1321 (9th Cir. 1988). In *Yahoo! Inc. v. La Ligue Contre Le Racisme Et, L'antisemitisme*, 2001 U.S. Dist. LEXIS 7565, the court indicated that the *Calder* effects test may be satisfied in cases wherein the plaintiff seeks only declaratory relief, as the thrust of the inquiry is on whether "the defendant's forum-related acts evidenced intentional, or at the very least knowing, targeting of a forum resident(s)." *Yahoo*, at p. 15. "The focus on evidence of "express aiming" reflects the basic rationale of the effects test in that it assures that a defendant is on notice that it may be subject to suit in the forum state with respect to its forum-related or targeted activities." *Id.* at p. 16. The court in *Yahoo* noted that in cases where the effects test was applied to a declaratory relief action, and personal jurisdiction was found, "the court generally has concluded or assumed that the underlying allegations sounded in tort." *Id.* at p. 14, n.3.

Although the Petition seeks to argue that *Asahi* stands for the proposition that the interest of the forum state is minimal when the dispute against the foreign entity involves indemnity, the selection of the forum of California in *Asahi* was incidental, while the forum state in the instant case is the target of vast sales of Bridgestone Corporation products. Even if there were any significance in the fact that the action herein is one for

indemnity, the *Yahoo* opinion makes it clear that the effects test may nonetheless be applied.

The Court of Appeal cited to *As You Sow v. Crawford Labs, Inc.*, 50 Cal.App.4th 1859 (1996), for its finding of economic activity as a matter of commercial actuality based upon that activity's reflection of "an effort to benefit from the California market." [Petition 10a, citing *As You Sow*, at pp. 1864-1865, 1871]. Thus, the fact that there were no direct sales by Bridgestone in California is irrelevant. As discussed above in Respondents' Objections to Questions Presented, Bridgestone retains joint control over the distribution of its tires in California. Moreover, Bridgestone's own website and public relations activities in the U.S. likely engendered many of the sales of the 25,000 tires received per month in California in the past two years. It is, therefore, evident that the Court of Appeal reached a correct result in its analysis of the reasonableness of the forum state's exercise of jurisdiction over the Petitioner.

D. If the Petition is Granted, then the Proper Issue for Consideration is Whether a Manufacturer's Use of a DOT Number May, When Coupled with Evidence of an Expectation that the Product will be Sold in the Forum State, Subject the Manufacturer to the Specific Jurisdiction of the Forum State

It was held in *Asahi* that minimum contacts are satisfied when the defendant places its product into the stream of commerce and engages in some additional activity directed to the forum state, such as "designing the product for the market in the forum State." *Asahi*, 480 U.S. at p. 112. A number of courts have looked to this

example of what additional conduct is required under *Asahi*, beyond placement of a product in the stream of commerce, to find specific jurisdiction in cases wherein the defendant designed its product for general distribution in the United States. *See Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1549 (11th Cir. 1993), discussed *infra*, under Section II; *Tobin v. Astra Pharmaceutical Prods., Inc.*, 993 F.2d 528, 543 (6th Cir. 1993) (seeking and obtaining approval from the Federal Drug Administration to sell drug in the United States indicates an intent or purpose to serve the forum state, thus satisfying minimum contacts); *see also Gulf Consolidated Serv., Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071, 1074 (5th Cir. 1990) (designing pipe to Texas organization's specifications showed intent to have products used in forum state, thus satisfying minimum contacts). In fact, since this Court's decision in *Asahi*, no federal Circuit Court of Appeals has declined to exercise jurisdiction over a foreign defendant manufacturing products that are designed to comply with state or federal regulations. Thus, there is no unsettled issue of jurisdictional law with respect to defendants, like Bridgestone, who intentionally design their products to conform to standards or regulations in the United States.

The record below confirms that the technical expert for the Petitioner's wholly-owned subsidiary, Bridgestone/Firestone, Inc., James D. Gardner, identified the tire which is the subject of this litigation as an M857 truck tire with "D.O.T." No. EK 17 3LJ098. The fact that the tire has been assigned a "D.O.T" (Department of Transportation) number evidences that the Petitioner is registered with the U.S. Government as a tire manufacturer and that it conformed its tire specifications to the requirements of the

forum state in order to ship tires to the United States for distribution in California, among other states.

The National Highway Traffic Safety Administration ("NHTSA") regulations regarding items of motor vehicle equipment imported for sale in the United States are codified in 49 CFR 400, et seq. To gain a certification of compliance with 49 CFR 574.6, a foreign manufacturer of tires must secure an identifier from the NHTSA with which to label its products. A DOT symbol and the manufacturer's identifier on the product then serves as a certification of compliance. Thus, the appearance of the DOT number on the tire necessarily means that the Petitioner designed its tires to include markings in accordance with the foregoing NHTSA regulation.

Moreover, 49 CFR 551 requires manufacturers of equipment for motor vehicles for importation into the United States to designate a permanent resident of the United States as the manufacturer's agent for service of all process, with such designation to be mailed to the NHTSA Chief Counsel. While it appears that the Petitioner failed to comply with this requirement, thereby forcing the Respondents to serve the Petitioner in Japan pursuant to the Haigue convention, the fact that it was required to designate an agent for service of process should evidence a reasonable expectation on its behalf that it would be haled into court in California, the base state for its exclusive point of receipt for distribution throughout North America.

Should this Court be inclined to grant certiorari, then the body of law ripe for examination is that surrounding the issue whether a manufacturer's conforming of its specifications to meet federal regulatory standards, in

conjunction with evidence of an expectation that the manufacturer's articles will reach the forum state, establishes enjoyment of a benefit sufficient to satisfy the requirement of minimum contacts and to confer jurisdiction upon the forum state over the Petitioner as a matter of law.

CONCLUSION

The Petitioner has failed to show this Court that there are any compelling reasons to grant certiorari. The Court of Appeal was correct in determining that the trial court may properly exercise jurisdiction. Based on the fact that the rulings of the lower courts are consistent with current federal law, and for the reasons set forth above, the Respondents, Kenai and T&T, respectfully request that the Petition for certiorari be denied.

Dated: January 29, 2003

Respectfully submitted,

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